Nos. 238, 254, 255

In the Supreme Court of the United States

OCTOBER TERM, 1957

SAMUEL KRASNOV, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

THE COMFY MANUFACTURING COMPANY AND FRED E. KATZNER, APPELLANTS

v.

UNITED STATES OF AMERICA

ARTHUR OPPENHEIMER, JR., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, appellee moves that the judgment of the District Court be affirmed.

STATEMENT

These are direct appeals from a final judgment entered on March 14, 1957, by the District Court, adjudging that appellants had combined and conspired to restrain interstate commerce in the manufacture and sale of ready-made knitted furniture slip covers and had combined and conspired to monopolize such commerce, in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. 1, 2), and granting injunctive relief.

The complaint, filed on June 7, 1950, named six defendants: The Comfy Manufacturing Company ("Comfy"), the largest slip cover manufacturer; Fred E. Katzner, Comfy's president; Samuel, Seymour and Joseph Krasnov, partners doing business as Sure-Fit Products Company ("Sure-Fit"), the second largest firm in the industry; and Arthur Oppenheimer, Jr. ("Oppenheimer"), the patentee of a patent for manufacturing knitted slip covers. All of the defendants other than Joseph Krasnov are appellants before this Court. Joseph Krasnov died after the District Court had decided the case, but before entry of the decree, and his executors have been substituted for him and are among the appellants in No. 238 (see *infra*, pp. 30–32).

The proceedings below

On January 21, 1954, the United States moved for summary judgment, after pre-trial proceedings in which the genuineness of virtually all the documents in support of the motion had been admitted by at least one defendant. The motion was accompanied

by an affidavit, a compilation of some 500 of these documents, and court records. None of the defendants submitted any opposing affidavits (or documents) under Rule 56 (e) of the Federal Rules of Civil Procedure. However, on December 19, 1955, 23 months after the Government's motion for summary judgment had been filed, and the day before the motion was scheduled for argument, the Krasnov defendants filed an affidavit of their counsel under Rule 56 (f) stating what "defendant Sure-Fit intends to prove" at the trial (J. St. No. 238, p. 52a).

On July 30, 1956, the court granted the Government's motion. The court held that there was no genuine issue as to any material fact, that the Government "has established by the introduction of *documentary evidence* all of the facts necessary to establish its case" (*id.*, 19a), and that such evidence established the conspiracy and combination charged in the complaint. After further proceedings, the court on March 14, 1957, entered a decree awarding injunctive relief (*id.*, 33a–41a).

The facts

The factual statement which follows is based upon the documents, held by the court to be "relevant and admissible" (J. St. No. 238, pp. 7a, 20a), which the Government submitted in support of its motion for summary judgment, and upon which the court based its decision.

1. The Oppenheimer patent and its assignment to Comfy

On October 20, 1937, while Oppenheimer had pending an application for a patent covering the manufacture of ready-made furniture slip covers from knitted

fabrics, he agreed to assign all of his interest in the patent to Comfy (GX 475). He authorized Comfy "to grant unto others non-exclusive, non-assignable licenses" under the patent "subject to the terms of this agreement" (*id.* ¶ 11). Comfy agreed to pay royalties to Oppenheimer (*id.* ¶ 4), and Oppenheimer could reacquire the patent under certain conditions (*id.* ¶ 12, 18). On November 30, 1937, Oppenheimer was granted the patent. Pursuant to the October 20 agreement, he then executed a formal assignment of it to Comfy (GX 47[illegible]

Upon transfer of the patent, Comfy began to institute infringement suits. It did not proceed against manufacturers of allegedly infringing products (see GX 67–68), but decided that "it would be best to sue a store" (GX 68), primarily because of the known aversion of retailers to patent litigation (GX 73, 84). Comfy watched retail advertisements (GX 76, 77, 80), and its representatives visited stores to check for allegedly infringing products (GX 75, 80, 81). Upon discovering an alleged infringement, it demanded that retailers withdraw the infringing merchandise (GX 69, 76, 77, 81, 86; see GX 71), including with each demand newspaper accounts of suits already instituted against retailers (GX 71).

Some retailers withdrew competing merchandise (GX 79; see GX 81). However, Hecht Bros. of New York apparently failed to remove Sure-Fit's covers, and Comfy sued it in April 1938 for an injunction, damages, and accounting for profits (GX 87). The suit was dismissed without payment of damages (GX

89) when Hecht Bros. withdrew Sure-Fit's covers (GX 88) and, at Comfy's request (GX 90), wrote Comfy that the Sure-Fit product infringed the Oppenheimer patent and would not again be sold by Hecht Bros. (GX 90, 91). After the suit was settled, Comfy expressed the hope that "we will be able to get together with your store in the promoting of these Knitted Slip Covers" (GX 90).

Sure-Fit was aware of Comfy's suits against retailers selling Sure-Fit's products (GX 108). Its counsel stated that there was no "patentable invention in the Oppenheimer patent" and that "there is no possibility of the Oppenheimer patent's being sustained in any adequately contested case" (GX 105A). Sure-Fit demanded that Comfy cease threatening and suing its retail customers (GX 108). After Sure-Fit had "patiently waited" for Comfy to bring an infringe-

[1] At the same time, Comfy also sued Hutzler Brothers of Baltimore (GX 93). Comfy hoped that Hutzler would similarly settle the case by removing the offending merchandise, admitting the validity of the patent and the fact of its infringement (GX 95). Such a settlement, Comfy said, would be of "great benefit in the trade," especially since Comfy was then contemplating other suits against retailers and a manufacturer (GX 95; see GX 267). Instead, Hutzler challenged the validity of the patent (GX 93: Hutzler's Answer ¶ 10-14; Notice of Additional Defenses). Comfy regarded "the whole situation there" as "right ticklish" (GX 99), and after the case was set for trial (GX 102), it negotiated with Hutzler to discontinue the suit (GX 104; see GX 93). Hutzler, however, refused to admit the validity of the patent or the fact of infringement, and insisted that it would continue to purchase wherever it wished (GX 104). The suit was settled early in 1939 after Comfy had licensed Sure-Fit under the Oppenheimer patent (see GX 104, 93).

ment suit "directly against it as the manufacturer" (GX 108). Sure-Fit itself instituted suit in January 1938 against Comfy and Oppenheimer for a declaration that the Oppenheimer patent was void and for injunctive relief (GX 109). This suit was discontinued (GX 112) as a result of the agreement of October 4, 1938.

2. The Comfy-Sure-Fit Agreement of October 4, 1938

By this agreement (GX 1), Comfy gave Sure-Fit "a non-exclusive and indivisible license" under the Oppenheimer patent (¶ 1),[2] and agreed that it would "not grant unto others any right or license, express or implied," nor would it "sell such slip covers to" other manufacturers (¶ 11). The agreement also provided (¶ 6) that Comfy and Sure-Fit should "jointly determine" whether to institute patent infringement suits; that all expenses of such suits should, "before incurred," have the approval of both firms and "shall be borne equally by them"; and that, if either Comfy or Sure-Fit failed to approve a suit or a disbursement, "the other party may, in its discretion, at its own expense," proceed with the suit. Sure-Fit was required to sell its slip covers at prices and terms "not more favorable than the prices, terms and conditions of sale fixed" by Comfy (¶ 8 (a)). Comfy, in turn, bound itself not to "sell below its scheduled prices" (¶ 8 (c)).[3]

[2] Comfy also licensed Sure-Fit under another of its patents (GX 16), and Sure-Fit licensed Comfy under two of its patents (GX 1, ¶ 14; GX 17).

[3] Both parties could sell below scheduled prices "any goods sold as a close out, or as obsolete or unseasonable items" (¶ 8 (c)).

A document executed by Oppenheimer at the same time "approve[d] the foregoing agreement" between Comfy and Sure-Fit and waived certain rights "in consideration of the potential benefits and advantages which said agreement" represents to him (GX 1, p. 11). The Comfy-Sure-Fit agreement provided for "contributions" by Oppenheimer to the expenses incurred in infringement suits (GX 1, ¶ 6; see GX 2).

3. Infringement suits by Comfy and Sure-Fit

Following the agreement of October 4, 1938, Comfy and Sure-Fit embarked upon a course of patent litigation against both retailers and manufacturers of allegedly infringing slip covers.

a. Suits by Comfy against Retailers

Between 1938 and 1947, Comfy initiated ten suits against retailers. In general, they followed the pattern previously established by Comfy's suits against Hecht Bros. and Hutzler (*supra*, pp. 4–5). Representatives of Comfy would report on department stores selling slip covers manufactured by competitors (GX 140–41, 142, 240). After sending the retailer a notice that his sales of competing slip covers infringed the Oppenheimer patent and demanding discontinuance of such sales (*e. g.*, GX 115–120, 128, 147), Comfy would file suit (GX 148, 158, 170–72, 183, 191–92, 207–09, 224, 240–43) and give notice of the suit to the trade (GX 143, 149, 179, 295). Since retail stores are traditionally averse to any type of patent litigation (GX 137; see GX 73, 84), some stores would promptly remove the offending merchandise (GX 127,

130, 132).[4] None of the ten suits ever came to trial, for if the suits were set down for pre-trial (GX 231, 234–38), or if the defendant sought to contest the validity of the patent (GX 165, 168), Comfy would discontinue the suits (GX 150–56, 161A–D, 167–68, 173–78, 186–90, 202–04, 214–21, 244–49), ordinarily on condition that the supposedly infringing slip covers be removed (see GX 150–56, 174, 220, 247).[5]

b. Suits by Comfy and Sure-Fit Against Other Manufacturers

Nine days after the licensing agreement was signed in 1938, Comfy sued Med-Vogue Corp. for damages, profits, and an injunction for alleged patent infringement (GX 251). After Med-Vogue attacked the Oppenheimer patent (GX 252) and counterclaimed for damages for unfair competition from both Comfy and Sure-Fit (GX 252), Comfy discontinued the suit by stipulation (GX 254). Med-Vogue agreed to stop manufacturing knitted slip covers (GX 255, ¶ 1), and Comfy purchased part of its inventory and machin-

[4] One retailer removed a competitor's slip covers after discussion with a Comfy representative who reported (GX 139):

> Jack [representing the retailer] asked me to have you do him a personal favor—send Jack a letter advising him that in our opinion there is probable infringement and you may be forced to bring some action. Jack promised to pull the covers off sale with this excuse and send them all back.

[5] Comfy's first suit against Lit Brothers, a retailer, was settled when Lit Brothers agreed not to sell slip covers infringing the Oppenheimer patent (GX 174). When Lit Brothers subsequently sold slip covers manufactured by Vatco (*infra*, p. 9), Comfy's counsel recommended filing "a new suit" possibly "confined entirely to the breach of contract." "I believe this would be an excellent opportunity to litigate this situation *because the issue of validity, I believe, would be precluded by the agreement*" (GX 180). (Emphasis added.)

ery (GX 255, ¶ 6) and took over its customer accounts (GX 261–63). The $10,000 cost of disposing of the suit (see GX 255, Schedule B) was borne equally by Sure-Fit and Comfy (GX 256, see GX 260), after deducting Oppenheimer's $500 contribution (GX 482).

Comfy filed an infringement suit against Vatco Manufacturing Co. (GX 271) only after Vatco had notified the trade that the Oppenheimer patent was invalid, offered to guarantee its retail customers against infringement suits, and demanded that Comfy bring suit to settle once and for all the validity of the Oppenheimer patent (GX 265, 266). After the case had been placed on the trial calendar (GX 275–76), Comfy terminated it by an agreement releasing Vatco and its retail customers from all claims for damages and profits (GX 282). Vatco, however, refused to admit the validity of the Oppenheimer patent (GX 283).

On June 18, 1941, Comfy instituted an infringement suit for damages against Dyer-Gruen-Jackson (GX 296), a sub-licensee under a patent issued to one Fry (GX 294) a few weeks prior to the Oppenheimer patent. Comfy filed the action only after ascertaining that the defendant was financially weak (see GX 286, 288, 308), and, immediately after filing the complaint, Comfy's president stated that "[w]e may decide that this is the suit we will try" (GX 293). Quite unexpectedly, Louis Rosner, a manufacturer sublicensed under the Fry patent (GX 298, ¶ 3), was permitted to intervene in the case (GX 298–99), and asked the court to declare the Oppenheimer

patent invalid and enjoin Comfy from attacking Rosner's products (GX 301). After Rosner moved for summary judgment (GX 303) and served a subpoena upon Comfy's president (GX 304), the suit was discontinued. Comfy paid Rosner a substantial sum of money (GX 329, see GX 330), released him from paying damages to it (GX 330–31), and gave him a non-exclusive license under the Oppenheimer patent (GX 330, ¶ 2).[6] However, royalties payable under the license (GX 330, ¶ 4) were waived as to certain types of slip covers (GX 333a–d). This agreement was approved by Sure-Fit, on condition that its royalties to Comfy be reduced (GX 324), and by Oppenheimer (GX 331–32) who was advised at all times of the negotiations (GX 316, 317, 320, 325, 328) and contributed $1000 to the expenses incurred in the case (GX 330). The royalties paid by Rosner under the Oppenheimer patent license (GX 330, ¶ 4) were equally divided among Comfy, Sure-Fit and Oppenheimer (GX 340–41).[7]

During this period, Sure-Fit also brought suits against manufacturers. On October 22, 1938, it instituted a suit for a declaratory judgment that certain patents held by its competitor Med-Vogue Corporation were invalid (GX "X"). In 1941, two similar

[6] Rosner, however, refused to admit that the Oppenheimer patent was valid or that he had infringed it, and reserved the right subsequently to contest the patent (GX 330, ¶ 8).

[7] Comfy also filed an infringement suit in June 1942 against the Malden Novelty Co. (GX 343). The complaint was dismissed for want of jurisdiction over the defendant (GX 344–45); Comfy did not refile the suit in Massachusetts, where Malden was incorporated and did business (see GX 344).

suits were filed—one against Med-Vogue alone, and a second against Med-Vogue and another (GX "Y"). These three suits never came to trial, but remained on the docket until January 31, 1950, although in 1947 Sure-Fit had purchased all of Med-Vogue's machinery, equipment and good-will (GX 352–53),[8] and Mednick, its president, had agreed to stay out of the slip cover business (GX 352; see GX 365). The suits were simultaneously dismissed by Sure-Fit (GX "X", "Y", Stipulations of Dismissal) after the Department of Justice instituted the investigation leading to the present case (Transcript of Hearing on Motion for Summary Judgment, Dec. 20–21, 1955, p. 196).

4. Price-fixing by Comfy and Sure-Fit

Under the agreement of October 4, 1938, Sure-Fit agreed not to undersell Comfy and Comfy agreed to maintain its "scheduled prices."[9] Up to 1942, Comfy and Sure-Fit acted jointly in fixing prices (GX 22, 32; see GX 21). Thus, Comfy, in proposing a price reduction to Sure-Fit, said that it did not "want to do this unless it is agreeable to you" (GX 23), and Comfy's president at a later date asserted that he would shortly have the "opportunity to see Sure-Fit and discuss spring prices" (GX 32). Although the

[8] Sure-Fit and Comfy jointly shared the cost of this purchase (GX 356, 357) and Sure-Fit, at least, obtained "some excellent new accounts by the fact that Mednick is now out of business" (GX 358; see GX 359–60).

[9] A schedule of Comfy's prices was annexed to the agreement (§ 8 (a)). The schedule could be changed by Comfy upon reasonable notice to Sure-Fit, and such changed schedule was "binding" upon the latter (§ 8 (b)).

price-fixing clauses of the agreement were canceled in 1942 (GX 3), shortly thereafter a Sure-Fit customer who inquired as to Comfy's prices "of course, he found the prices in the same ranges and the same bracket" (GX 33).

During this period, Comfy and Sure-Fit acted jointly to maintain the resale prices charged by their customers (*e. g.*, GX 24–27). Thus, appellant Katzner wrote Sure-Fit in 1941 that "I will make every effort to have Mr. Heliof of Gimbel's in Pittsburgh raise their retail selling price on davenports" (GX 24), and Comfy asked Sure-Fit to see that two of its retail customers "agree to establish" certain resale prices (GX 26). After 1942, Comfy vigorously enforced the same policy as to its own retail customers. (GX 34–49, esp. GX 38, 41, 45).

Occasionally, Comfy and Sure-Fit deviated from the prices fixed by them. Comfy, however, concluded that "there was no real harm being done" by Sure-Fit's concessions, so long as "they were confined mostly to Sure-Fit's own customers." (GX 18a). But Sure-Fit's 20% discount to a Comfy customer was "an entirely different story" and a "violation" of the agreement.[10] "We must definitely understand each other that we cannot approach each other's accounts with inducements that violate the licensed [*sic*] agreement * * *. Unless we agree on the above, I can see no purpose in maintaining our licensed [*sic*] agreement with Sure-Fit, and believe we should take some immediate steps to correct this bad situation." (*Ibid.*)

[10] Sure-Fit likewise complained that Comfy had granted "concessions in excess of those provided by the contract" (GX 18).

5. Other anticompetitive activities of Comfy and Sure-Fit

Sure-Fit and Comfy gave special allowances and privileges to favored customers, since "we must both understand and agree that an occasional reduction in price or other inducement may be necessary because of some local situation or competition with non-licensed manufacturers" (GX 18a). Thus, Sure-Fit had "a special deal" (GX 400) for certain customers whose purchases "remain exclusively with us" (GX 395; see esp. GX 406; also GX 405, 407, 409).[11] It gave a "special rebate" (GX 438; see GX 439), allowed sales on consignment (GX 435), granted advertising allowances (GX 394, 395, 399–401, 403, 405, 408–09, 412–13, 417), paid the salary of a customer's employee whom Sure-Fit had trained (GX 415), and gave one customer "an exchange privilege which will be very costly to us" (GX 419), as well as return privileges to other customers (*e. g.*, GX 430, 431, 433, 434; see GX 426). Comfy, in return for exclusive dealing agreements (*e. g.*, GX 444–445, 454, 456), similarly gave favored customers (see GX 462) such preferences as advertising allowances (*e. g.*, GX 442, 444, 448, 460, 461), special exchange privileges (GX 444, 446, 451, 455), rebates (GX 446), and other contributions (GX 449, 453, 457). Such arrangements were to remain confidential because they were "contrary to the general policies of this company" (GX 442; see GX 445).

[11] These "deals" were "primarily intended for breaking into the larger accounts" (GX 393; see GX 413, 416, 417) and were not available to accounts with "low ratings" (GX 393).

Other practices shown by the record include contracting with suppliers not to sell supplies to competing manufacturers (GX 465), making disparaging statements about the products of competing manufacturers (GX 463), and purchasing slip covers of other manufacturers (in one instance at a loss, GX 388) and reselling them through retail outlets (GX 381, 385, 387; see also GX 384, 386, 388).

The District Court's decision

In holding that "the Government * * * has effectively demonstrated that the defendants combined and conspired not only to restrain trade unreasonably but also to moopolize trade and commerce * * * in the manufacture and sale of ready-made furniture slip covers" (J. St. No. 238, p. 32a), the District Court stated (*id.*, 19a) that the "undisputed documents," the genuineness of which was admitted, "show a conspiracy to restrain trade and monopoly, acts done in accordance with the conspiracy and harmful effects upon trade in the particular industry." The court pointed out (*id.*, 12a) that the October 4, 1938, agreement between Comfy and Sure-Fit—"the basic document of this conspiracy" (*id.*, 11a)—was entered into "at a time when the * * * validity of the Oppenheimer patent had not been determined and, in fact, after all parties concerned had clearly agreed never to permit judicial determination of its validity * * *," and that the defendants thereby "intended (and achieved)" "a deliberate division of the trade." The court held (*id.*, 32a) that the numerous infringe-

ment "suits against competitors * * * were designed as and were actually only harassing suits"; that the Government had established "by documentary proof" that the defendants "have used patent rights unlawfully in instituting, effectuating and maintaining the aforesaid combination and conspiracy" (*ibid.*); that it was "abundantly clear from the record" that "the defendants in combination controlled the market and had the ability to and did drive competitors from the business of manufacturing knitted fabric slip covers," and that it was "crystal clear" that they concertedly "fixed and maintained prices" (*id.*, 31a); and that the provisions in the October 4, 1938 agreement for price-fixing, cross-licensing of patents, and joint determination whether to institute infringement suits, "were well beyond the protection afforded by patent grants" (*id.*, 25a).

The court's decree, entered after a further hearing, cancelled the patent licensing agreement of October 4, 1938, and prohibited its performance or enforcement (J. St. No. 258, p. 34a). The court enjoined the defendants from "combining or conspiring," or otherwise agreeing "with any other person" to fix prices (except pursuant to "fair trade" laws), or to "monopolize or attempt to monopolize" the industry; from engaging in various restrictive trade practices, or from instituting or maintaining harassing patent suits (*id.*, 34a–36a); and directed the defendants to grant non-exclusive patent licenses at reasonable royalties, free from any "restriction or condition" except those authorized in the decree (*id.* 37a–39a).

ARGUMENT

1. The District Court correctly granted summary judgment in favor of the Government

Rule 56 (c) of the Federal Rules of Civil Procedure provides that summary judgment may be granted if the pleadings, depositions, admissions, and affidavits show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We submit that the District Court correctly held that there was no genuine issue as to any material fact, and that the Government was entitled to judgment as a matter of law.

A. In support of its motion for summary judgment, the Government filed an affidavit with more than 500 documents, the genuineness of which was admitted, and which the District Court held to be "relevant and admissible" (J. St. No. 238, pp. 7a, 20a). None of the defendants submitted any opposing affidavits under Rule 56 (e). However, 23 months after the Government's motion for summary judgment had been filed, and the day before the motion was to be argued, the Krasnov defendants filed, under Rule 56 (f), an affidavit by their attorney constituting an offer of proof of what Sure-Fit would show at the trial. The affidavit stated (*id.*, 56a) that Sure-Fit "cannot present by affidavit all the facts and details encompassed by the above offers of proof, as well as other facts and details which defendant Sure-Fit intends to offer upon the trial * * * for the reason, inter alia, that such factual matters are voluminous and to a substantial extent in the possession of other

parties, the interests of some of whom are adverse to this defendant."

That affidavit did not suffice to raise any factual issues which would require denial of the motion. Affidavits under Rule 56 (f) are required to set forth in detail the reasons why the affiant is unable to file evidentiary affidavits (*Peckham* v. *Ponrico Corp.*, 7 F. R. D. 324, 330 (D. Puerto Rico), reversed on other grounds, 171 F. 2d 653 (C. A. 1); *Schultz* v. *Manufacturers & Traders Trust Co.*, 30 F. Supp. 443 (W. D. N. Y.)), and what efforts have been made to obtain such evidence (see *Sarkes Tarzian, Inc.* v. *United States*, 140 F. Supp. 863, 867 (S. D. Ind.), reversed on other grounds, 240 F. 2d 467 (C. A. 7)). The Krasnov defendants had ample opportunity either to obtain affidavits or to take depositions or obtain discovery during the 23 months between the filing of the Government's motion and the submission of the attorney's affidavit.[12] The District Court there-

[12] The Krasnov appellants attempt to justify their belated filing of an attorney's affidavit on the ground that the District Court ruled at the pre-hearing conferences that the defendants would have an opportunity to object to the introduction of any of the documents before they became a part of the record, and that "[o]n several occasions the court indicated that the case was to be disposed of at trial rather than on the motion" (J. St. No. 238, p. 9; see pp. 28–29). However, as the District Court pointed out (*id.*, 7a), the pre-trial proceedings were held "[b]ecause of objections by the defendants to the consideration of the various documents" submitted by the Government in support of the motion, and the proceedings "were availed of to determine which of the exhibits were relevant and admissible." At the pre-trial conferences, the defendants objected to the admissibility of a number of the documents, and argued these objections at length (Transcript of Pre-trial Proceedings,

fore properly concluded (J. St. No. 238, p. 8a) that there was "no genuine issue as to any material fact or any of the inferences which are drawn from the facts" established by the Government's documentary evidence.

The Krasnov appellants contend (J. St. No. 238, p. 26) that *Frederick Hart & Co.* v. *Recordgraph Corp.*, 169 F. 2d 580 (C. A. 3), established the rule in the Third Circuit that "summary judgment cannot be entered" when "the affidavits and other evidentiary matter of the moving party controvert the allegations contained in the pleading of the opposing party" and that, since the defendants' answers contradicted "matters stated in the [Government's supporting] documents," "the defendants should have been given the opportunity to offer evidence in support of their answers" (*id.*, 27). As the District Court correctly pointed out (*id.*, 18a), however, the *Hart* case held only that "affidavits filed in support of motions for summary judgment may be considered for the purpose of ascertaining whether an issue of fact is present but that they cannot be used as a basis for deciding the fact issue," and that the *Hart* case was inapplicable since "[t]he Government has established by the intro-

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May 17, 1954 and February 2, 1955). In addition, both sides submitted memoranda of law on the question. Furthermore, following those proceedings the District Court itself ruled that a few of the documents were not admissible, and those documents "were not referred to in determining the facts" (J. St. No. 238, p. 7a). The remaining documents, which the court held were "relevant and admissible," met the requirements of Rule 56 (e) that the supporting affidavit and documents "set forth such facts as would be admissible in evidence."

duction of documentary evidence all of the facts necessary to establish its case" (*id.*, 119a).

The *Hart* case does not hold, as appellants would read it, that a mere general denial of the allegations in the complaint (such as the Krasnovs' answer here contained) raises factual issues with respect to detailed factual statements set forth in the plaintiff's affidavit and supporting documents.[13] Indeed, the rule which appellants propose would, as a practical matter, preclude the use of summary judgment in any case in which the defendant filed a general denial, even though the plaintiff's supporting documents established, as they did in the instant case, that there was no genuine factual issue.

In deciding the motion, the District Court, therefore, was not called upon to resolve any factual issues but only to draw inferences from the undisputed facts. Necessarily, inferences must be drawn in determining whether the undisputed facts show that the moving party is entitled to judgment as a matter

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[13] The holding in *Hart* was that the District Court had erred in granting a motion to dismiss the complaint, since "the existence of a fact issue" with respect to a certain conversation had been established by conflicting affidavits filed by the plaintiff and the defendant, and by a specific allegation in the defendant's answer relating to the conversation (169 F. 2d at 583).

The rule for which appellants cite the *Hart* case has been severely criticized (see 6 Moore's *Federal Practice* ¶ 56.11 [3] at p. 2069; 99 U. Pa. L. Rev. 212, 214–15), and has been rejected in a proposed revision of the Federal Rules of Civil Procedure, now before this Court. See *Report of Proposed Amendments*, October 1955, pp. 56–58.

of law.[14] This Court has upheld summary judgments in antitrust cases where the district court similarly drew appropriate inferences in favor of the Government. *E. g., Associated Press* v. *United States*, 326 U. S. 1; *International Salt Co.* v. *United States*, 332 U. S. 392; cf. *United States Gypsum Co.* v. *United States*, 339 U. S. 959; *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 82–86; cf. also, *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U. S. 457.

B. The District Court correctly held, on the basis of the facts shown by the Government's affidavit and documents, that appellants had conspired and combined to restrain unreasonably and to monopolize the ready made furniture slip cover industry, in "clear violation of the Sherman Antitrust Act" (J. St. No. 238, p. 32a).

1. Comfy and Sure-Fit together had 61% of the market; their nearest competitor had only 9%; and the remaining 30% was spread over twelve or more firms.[15] Following the signing of the patent licensing

[14] Appellants in No. 254 state (J. St. 11–12) that they "know of no other instance" where a court has found an attempt to monopolize upon a motion for summary judgment, and that it is "difficult to conceive of a record which would eliminate any dispute as to the fact of specific intent which normally determines such an issue." The fact is, however, that, although the complaint did charge an attempt to monopolize, the District Court did not find such an attempt, but only a conspiracy and combination to monopolize. J. St. *Id.*, 32a, 34a.

[15] These figures are derived from the Government's affidavits filed in support of the motion for summary judgment. Although Comfy challenges the use of these figures on the basis of figures for other years (J. St. No. 254, pp. 10–11), it never controverted the Government's data through opposing affidavits under Rule 56 (e). Its figures for other years were presented

agreement of October 4, 1938, these two dominant firms jointly embarked upon a program of patent infringement litigation which, the District Court correctly held, was designed to eliminate and harass competition and thereby to secure for the conspirators a larger share of the market.

As the District Court pointed out (*id.*, pp. 13a–14a), they preferred to sue retailers rather than allegedly infringing manufacturers because "[t]hey recognized and took full advantage of the almost universal aversion of a retailer to patent litigation and their suits were brought for the purpose of having the retailer discontinue a competitor's line and adopt theirs; they had no interest or intention of adjudicating the validity of the Oppenheimer patent." The effect of these suits against retailers was that many of them, as the price of terminating the litigation, discontinued handling competing merchandise. Although a determination that the Oppenheimer patent was valid would have given Comfy and Sure-Fit the basis for seeking a lawful monopoly, they carefully avoided any adjudication of the patent's validity, even going so far as to settle the Rosner suit at substantial expense to both of them as soon as Rosner vigorously raised the issue (see *supra*, pp. 9–10). Significantly, that suit, brought against a competing manufacturer *for damages*, was filed only after it had been determined that the prospective defendant was financially weak (*ibid.*).

(in connection with the relief proceedings) only *after* the District Court had granted the motion for summary judgment, and not by affidavit but in letters from the Census Bureau.

Harassment of competitors by patent litigation is a familiar technique in antitrust cases. *E. g., Patterson* v. *United States,* 222 Fed. 599 (C. A. 6), certiorari denied, 238 U. S. 635; *Kobe, Inc.* v. *Dempsey Pump Co.,* 198 F. 2d 416, 424 (C. A. 10), certiorari denied, 344 U. S. 837; *United States* v. *Besser Mfg. Co.,* 96 F. Supp. 304, 311-312 (E. D. Mich.), affirmed, 343 U. S. 444; *United States* v. *Hartford-Empire Co.,* 46 F. Supp. 541, 565 (N. D. Ohio), affirmed in part, 323 U. S. 386; *Stewart-Warner Corporation* v. *Staley,* 42 F. Supp. 140, 146 (W. D. Pa.). Here, as in *Hartford-Empire,* "the power of litigation pursued by a strong combination of two companies * * * is brought into play against individual companies, most of them [retailers or] small manufacturers * * *." The record fully justified the District Court's conclusion that Comfy and Sure-Fit jointly had engaged in a similar program of unlawful harrassment.

2. The existence of the conspiracy is further shown by various restrictive provisions in the licensing agreement—provisions which not only were important elements of the conspiracy and in its effectuation but themselves were illegal because they exceeded the proper scope of patent rights.

(a). The provision in the license agreement giving Sure-Fit the right to bring infringement suits if Comfy refused to do so was illegal. The only persons who can sue for infringement are the patentee, his assignee, grantee or personal representative. *Crown Die & Tool Co.* v. *Nye Tool & Machine Works,* 261 U. S. 24, 40–41. Comfy, as the assignee of the patent, had the right to sue for infringement. However, Comfy

was authorized to grant only non-exclusive licenses (*i. e.*, those under which the licensor himself is not precluded from manufacturing or selling, *Crown Die* case, *supra*, pp. 37–38) and Comfy in terms gave Sure-Fit only such a license.[16] The only property interest which a non-exclusive licensee (whether he is the sole such licensee, as here, or one of many) has in the patent is the right to make and sell thereunder. He has no right to exclude others from practicing the invention (through infringement suits) (*Blair v. Lippincott Glass Co.*, 52 Fed. 226 (D. Ind.); *Western Elec. Co.* v. *Pacent Reproducer Corp.*, 42 F. 2d 116, 118 (C. A. 2), certiorari denied, 282 U. S. 873; *Davision* v. *Alexander Smith & Sons Carpet Co.*, 22 F. Supp. 461, 462 (S. D. N. Y.)), since that right is limited to the patentee, an assignee, or an exclusive licensee. Insofar as the agreement authorized Sure-Fit to bring infringement suits if Comfy refused to do so, it exceeded the lawful scope of the patent monopoly. See *Waterman* v. *Mackenzie*, 138 U. S. 252; *Crown Die* case, *supra*, at pp. 39–40.

(b). Similarly beyond the scope of the patent grant was the provision prohibiting Comfy from granting other licenses without Sure-Fit's consent. Since Sure-Fit was a non-exclusive licensee under the patent (see *supra*, pp. 6, 22–23), it had no legitimate interest

[16] Appellants in No. 238, although recognizing that Sure-Fit received only a non-exclusive license, argue that Comfy's agreement not to grant any other licenses gave Sure-Fit "an exclusive license within the meaning of the patent laws" (J. St., 13–14). They cite no authority for this proposition, and we believe that the law is clearly to the contrary. See the text, *supra*.

in preventing the issuance of other non-exclusive licenses. The provision giving it a veto power over the grant of other licenses was obviously "intended * * * to be a means whereby control of the industry could be acquired and competition eliminated." *United States* v. *Besser Mfg. Co.*, 96 F. Supp. 304, 311 (E. D. Mich.), affirmed, 343 U. S. 444. In *Besser*, the court invalidated an agreement under which the "patentees have joined hands with the two largest competitors in the industry" and, "by requiring their joint consent before licensing others," has given them "the power to restrict competition" and has "virtually made it impossible for others to obtain rights under those patents. * * * It is this combination requiring collective action that primarily invalidates the agreement." The same principle, we submit, is equally applicable to an agreement under which "the two largest competitors in the industry," with the consent of the patentee, similarly have "joined hands" to make it "impossible for others to obtain rights" "by requiring their joint consent before licensing others" under a patent held by one of the competitors as an assignee authorized to grant only non-exclusive licenses.

(c). The price-fixing provisions, under which Sure-Fit agreed not to undersell Comfy, and Comfy agreed to maintain its "scheduled prices," and pursuant to which the two firms fixed prices (see *supra*, pp. 11–12), were also invalid. Appellants seek to justify these provisions under *United States* v. *General Electric Co.*, 272 U. S. 476 (J. St. No. 238, pp. 16–21), where this Court held that the requirement in a patent license that the licensee sell at not less than the prices

at which the patentee itself sells is within the implied terms of the patent grant. The ground of decision was that this limitation is "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly," in that it enables the patentee to obtain as a reward the return coming from multiple exploitation of the exclusive rights conferred by his patent, without impairing his opportunity to obtain the reward which comes from selling the patented product himself at whatever price he thinks will bring the greatest return. 272 U. S. 476, 489–490.

In the instant case, however, the agreement went beyond requiring the licensee to observe the licensor's prices, and bound the licensor itself not to deviate from its prices. This latter provision, we submit, cannot be justified as "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." On the contrary, the *General Electric* case indicates that protection of the patent monopoly contemplates that the patentee will be free to set the price of his product at whatever level he deems best. Furthermore, the *General Electric* rule is applicable only if "a conspiracy to restrain trade or an effort to monopolize is not involved." *United States* v. *Line Material Co.*, 333 U. S. 287, 304. In the instant case, as we have shown, the price-fixing was part of a conspiracy by Sure-Fit and Comfy to restrain and to monopolize trade.[17]

[17] Comfy and Sure-Fit acted jointly to maintain resale prices at the retail level. See *supra*, pp. 11–12. Such an agreement clearly was illegal. *United State* v. *Univis Lens Co.*, 316 U. S. 241.

2. The relief granted by the District Court was proper

Appellants in Nos. 238 and 254 challenge various provisions of the decree. Primarily, they attack paragraph VI, which prohibits the appellants "jointly and severally" from engaging in certain restrictive trade practices. We submit, however, that the challenged provisions represented a proper exercise of the District Court's broad "discretion * * * to make the remedy as effective as possible" (*United States* v. *National Lead Co.*, 332 U. S. 319, 334), and were fully justified in order "effectively [to] pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt Co.* v. *United States*, 332 U. S. 392, 401–402). Furthermore, since appellants "were found to have plainly disregarded the law," the District Court "was justified in its determination that it was necessary to include some restraint in its order against" the appellants "individual[ly] in order to prevent a continuance of the unfair competitive practices found to exist." *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 429–430.

Appellants in No. 238 argue (J. St. 24–25) that the District Court did not "find" that the allegations in the complaint with respect to the restrictive trade practices enjoined in paragraph VI had been "sustained,"[18] and that, in any event, there was no "foundation in the record for concluding that such relief is necessary and appropriate" to "dissipate a

[18] Appellants in No. 254 similarly assert (J. St. 6) that these allegations "had not been found in the opinion to be sustained by the evidence."

conspiracy." But the absence of findings with respect to the practices is immaterial, since Rule 52 (a) expressly provides (with an exception not here material) that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule * * * 56 * * *." As long as the record affords an adequate basis for the conclusion that prohibition of the practices is necessary in order "effectively [to] pry open to competition" the market, the relief was proper.

In the instant case, the record shows that the principal anticompetitive device used by the conspirators was harassing patent litigation. But Comfy and Sure-Fit employed other restrictive practices which were designed to, and did, aid them in carrying out their conspiracy to restrain and monopolize the knitted slip cover industry. Thus, the exclusive dealing arrangements with important customers, which Comfy and Sure-Fit obtained by giving discriminatory preferences (see *supra*, p. 13), effectively barred other manufacturers from that segment of the market. Competitors were likewise excluded as a result of the conspirators' insistence that retail customers, as the price of terminating infringement suits, cease handling competitors' products (see *supra*, pp. 7–9, 13–14). In addition, the conspirators contracted with suppliers that the latter would not sell to other manufacturers, made disparaging statements about competitors' products, and removed such products from the market by purchasing and reselling them through retail outlets (see *supra*, p. 14).

Paragraph VI, which broadly prohibits all of the foregoing restrictive practices, represented a sound exercise of the District Court's discretion to provide relief adequate to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88). Moreover, relief is not limited to prohibiting the precise practices shown by the record, "but may range broadly through practices connected with acts actually found to be illegal * * * relief, to be effective, must go beyond the narrow limits of the proven violation" (*Gypsum* case, *supra*, pp. 89, 90). In view of the clear evidence that appellants had conspired to restrain and to monopolize trade, we believe that, even assuming *arguendo* that there was only relatively slight evidence of some of the restrictive practices, the District Court did not abuse its discretion in "forbid[ding] the doing in the future of acts like those * * * found to have been done in the past which would be violative of the statute" *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78).[19]

Appellant Comfy challenges the provision in paragraph VI (c) prohibiting appellants from granting special discounts, advertising allowances, or return privileges to favored customers, on the ground that

[19] The third question presented in No. 254—whether a District Court may enjoin antitrust defendants individually from engaging in restrictive trade practices "in the absence of any evidence that such practices were related to the conspiracy found by its opinion or that such relief was required by competitive conditions in the industry" (J. St. 3, 16)—is therefore not in fact presented. For here the record shows both that the prohibited practices were an integral part of the conspiracy, and that their prohibition was necessary for effective relief.

the court was attempting to enjoin violations of the Robinson-Patman Act which were not charged in the complaint (J. St. No. 254, pp. 13–16). The short answer is that the court was prohibiting restrictive practices which were a part of the conspiracy and which, if continued, would permit the conspirators to retain the fruits of their unlawful conduct. The complaint alleged (¶ XI (i) (2)) that, as one of the "substantial terms" of the conspiracy, the defendants had granted "special discounts, excessive advertising allowances and abnormal return privileges to retailers who agree to carry their merchandise exclusively," and the record showed that appellants had engaged in such practices (see the Statement, *supra*, pp. 13–14). As appellants themselves concede (J. St. No. 254, pp. 15–16), the fact that, under certain circumstances, such practices also might violate the Robinson-Patman Act does not preclude the District Court from enjoining them in order to cure a Sherman Act conspiracy.

Comfy also assails the provision in paragraph VI (d) which prohibits the appellants from making exclusive dealing arrangements with retailers (J. St. No. 254, pp. 17–18). Such arrangements, however, were an important step in appellants' campaign to dominate the industry; indeed, an agreement by a retailer to deal exclusively with one of the conspirators generally was the price for terminating a patent infringement suit (see the Statement, *supra*, pp. 7–9). Nor is there any basis for Comfy's attack (*id.*, 17) on the prohibition in paragraph VI (B) against making "false, derogatory or disparaging statements" about competing slip covers, or "false statements" as to the

financial ability of competing manufacturers. The making of such statements about competitors' products was alleged in the complaint as one of the methods of the conspiracy (¶ XI (i) (3)), and is shown by the record (GX 463). The District Court did not abuse its discretion in prohibiting the practice.

The Krasnov appellants attack, as "vague and all-inclusive" and "unwarranted by the record", paragraph V (b), which enjoins the defendants from "combining and conspiring" or from contracting or agreeing to "monopolize or attempt to monopolize the manufacture, distribution or sale" of ready-made furniture slip covers (J. St. No. 238, p. 24). This provision was plainly proper, since it prevents any repetition of the conspiracy here involved. Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186–187. It is sufficiently specific so that appellants "may know their duties and unintended contempts may not occur." *International Salt Co.* v. *United States*, 332 U. S. 392, 400.

3. The action did not abate as to Joseph Krasnov

On July 30, 1956, the District Court rendered its opinion holding that the defendants had violated the antitrust laws. The decree was entered on March 14, 1957. On April 9, 1957, Samuel and Seymour Krasnov advised the court that defendant Joseph Krasnov had died on February 16, 1957 (approximately one month prior to entry of the judgment), and on April 23, 1957, they moved to delete his name from the judgment, on the ground that the action had not survived against him. The District Court denied the motion

(J. St. No. 238, pp. 42a-43a), and substituted his executors as parties to the judgment.

We submit that the District Court correctly held, contrary to the Krasnov appellants' contention (*id.*, 29), that the action did not abate as to Joseph Krasnov on his death. Under Rule 25 (a) of the Federal Rules of Civil Procedure, a court may order substitution of parties when a party dies "and the claim is not thereby extinguished." Unlike many actions at law, suits in equity generally do not abate upon the death of a party. *Clarke* v. *Mathewson*, 12 Pet. 164, 171; *Edgerton* v. *Johnson*, 178 F. 2d 106, 110 (C. A. 7); *Sullivan* v. *Associated Billposters and Distributors*, 6 F. 2d 1000, 1003 (C. A. 2). Under the Sherman Act, even actions at law may survive the death of a party. *Barnes Coal Corp.* v. *Retail Coal Merchants Ass'n*, 128 F. 2d 645 (C. A. 4); *Moore* v. *Backus*, 78 F. 2d 571 (C. A. 7); *Sullivan* v. *Associated Billposters and Distributors*, *supra*; *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 232 Fed. 574 (C. A. 2). This equity action was brought by the Government to vindicate the public interest by eliminating trade restraints affecting a substantial volume of interstate commerce, and the Government's "claim" was not extinguished until effective relief against such restraints was provided. An injunction against only two members of the Krasnov partnership, which would leave the heirs of the deceased partner free to continue the illegal activities, would not be adequate to "assure the public freedom from its [their] continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88.

In any event, as the court pointed out (J. St. No. 238, pp. 42a–43a), the decree could have been entered *nunc pro tunc* as of a date when Joseph Krasnov was still alive. See 1 Freeman on *Judgments* § 122 (5th ed., 1925). A judgment *nunc pro tunc* "presupposes * * * a decree in a cause which is under advisement when the death of a party occurs." *Cuebas y Arredondo* v. *Cuebas y Arredondo*, 223 U. S. 376, 390. *A fortiori*, a judgment *nunc pro tunc* may be entered where the case is no longer under advisement but has been decided.

4. The District Court correctly held that appellant Oppenheimer was a party to the conspiracy

Appellant Oppenheimer contends only that the District Court erred in holding him to be a party to the conspiracy. He argues (J. St. No. 255, pp. 4–5) that his activities were solely those "of an inventor interested in collecting royalties on his patent," and that there was "no proof" that he had knowledge "of the alleged acts of Comfy and Sure-Fit," which proof "is required before he can be held to be a co-conspirator."

Oppenheimer admits (*id.*, 4), however, that he approved the licensing agreement between Comfy and Sure-Fit; and that he agreed to, and did, contribute to the expenses of the harassing infringement suits (GX 329–330, 478–479, 482, 486). Since the suits against retailers usually resulted in the latter ceasing to handle competing merchandise (see *supra*, pp. 7–9), their effect necessarily was to increase sales of Comfy and Sure-Fit products, and therefore to

increase Oppenheimer's royalties. Furthermore, the evidence showed that Oppenheimer was kept informed as to the progress of the negotiations with Rosner for terminating the suit in which the latter had attacked the validity of Oppenheimer's patent (GX 316, 317, 320, 325, 328), that he contributed to the expenses incurred in discontinuing the suit, and that he shared equally in the royalties paid by Rosner under the license which Rosner received from Comfy (GX 492). In addition, the court noted (J. St. No. 238, p. 30a), Oppenheimer "readily acquiesced in reduction of patent royalties whenever necessary to end litigation which would determine the validity of the patent." As the District Court correctly held (J. St. No. 238, p. 30a), he "formed a necessary part of the whole," and his participation in this conspiracy was fully established. See *United States* v. *Falcone*, 311 U. S. 205, 211. The fact that Oppenheimer was "not engaged in the slip cover business" (J. St. No. 255, p. 4) is not inconsistent with the court's ruling that he had been a party to a conspiracy to restrain and monopolize that business.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that these appeals present no substantial question. The judgment of the District Court should be affirmed.

Respectfully submitted.

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